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THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1939.

[Changes Income-tax law as from 1st April, 1939.]

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Within the last two years we have had three important measures brought before the Legislature which affect practically every person who is in some way or other connected with the trade and commerce of the country. Of these, the Indian Companies (Amendment) Act and the Insurance Act were passed into law in the two previous years. This year, the Indian Income-tax (Amendment) Bill has been passed by both the Legislative Assembly and the Council of State and assented to by the Governor-General. It may not be too much to claim that by far the most important of these three measures is the new income-tax legislation. Income-tax with all its intricacies is a subject of perennial discussion and everyone in contact with commercial affairs knows that tax considerations enter into every bargain and financial transaction. The days are past when the tax involved was relatively small and one could with equanimity be indifferent to it. It is almost true to say that income-tax is very often the most important single item in an annual account as it represents a compulsory payment out and not an item of mere debt due on accounts. Hence it is essential to exercise continual watchfulness in regard to the effect of transactions in relation to income-tax, and to understand exactly what the implications of the legislation are.

The New Act is called an Amending Act but there is hardly any section of importance in the present Act which is left untouched. Some sections which have been substituted in the place of the existing ones and others which have been newly introduced have radically altered the existing law and after incorporating the present amendments, one will find that he has got practically a new Act. In the present Act there are 96 sections comprising the original sections and the additions under various Amendment Acts. As many as 65 out of the 96 sections have been amended, 6 sections completely substituted, 5 sections omitted and 14 newly added. Complications of interpretation are inevitable and the help of professional men would be more constantly required under the new enactment than under the old.

The Act is frankly designed to bring in more revenue to the Exchequer by closing all existing defects or loopholes in the Act leaving no chance for tax dodgers being left free and by extending the scope of taxation by bringing into the net fresh items of income. The administrative machinery has been strengthened and improved so as more effectively to deal with evasion of tax. It has been claimed by the framers of the Bill that there has been no fundamental alterations but on a perusal of the provisions one feels that there have been sudden and abrupt variations of the principles of taxation. It is likely that the Income-tax Officer will apply the letter of the law as it suits revenue best.

The assessment of foreign income has been the most contentious and complicated item of discussion in the Assembly. Indeed at one stage, it appeared that the Bill would not be proceeded with. But Sir James Grigg skilfully avoided such an ending and with the co-operation of the Congress Party and the Muslim League, a compromise formula was adopted and passed by the Assembly under which foreign income is made assessable on an accrual basis despite its non-receipt in British India.

The main changes and the new provisions of the Amending Act are best considered under distinct headings. References given are to the sections of the 1922 Act.

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II. Return of information and furnishing particulars.

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I. Compulsory returns

A system of compulsory returns has been introduced in S. 22. Each person whose total income exceeds the taxable limit must voluntarily send a return of income within 60 days of the income-tax authorities giving notice by publication in the press and an assessee may apply and obtain extension of time for the delivery of the return. Hitherto there was no pecuniary penalty leviable by an Income-tax Officer for non-submission of a return but only a prosecution before a Magistrate under S. 51 of the existing Act. Now, pecuniary sanction by way of imposition of penalty by the Income-tax Officer himself for non-submission of returns is provided for. The penalty for non-submission of a return is up to a limit of 1½ times the tax levied, while the penalty for non-production of evidence after submission of a return is less, that is, up to a limit of 1½ times the difference between the tax leviable on the returned income and the income assessed. But in the case of a person whose total income is less than Rs. 3,500 or in the case of an agent of a non-resident, no penalty can be levied for non-submission of return unless a notice calling for

a return of income is served on him. If a person who has failed to submit a return even after being served with an individual notice calling for the return of income proves that he had no assessable income, a nominal penalty is leviable up to a maximum of Rs. 25.

II. Return of information and furnishing particulars

(*i*) Hitherto persons who pay interest of Rs. 1,000 and above had voluntarily to furnish a return of the names and addresses of all persons to whom such interest was paid and now the limit has been reduced to Rs. 400.

(*ii*) Every person engaged in any business, profession or vocation should furnish along with this return of income full particulars of location and style of principal place, branches, names, addresses and share of partners.

(*iii*) The assessee, when required, has to furnish a statement of persons to whom rent, interest, commission, royalty or brokerage, etc., amounting to more than Rs. 400 is paid in any year.

(*iv*) The officer may require any person to furnish particulars of all securities of which he was the owner during the year for the purpose of discovering whether through any transaction or dealings in the securities, he has evaded payment of proper tax. Failure to give such information entails a very heavy penalty.

(*v*) The trustees of approved superannuation funds and employers who contribute to approved superannuation funds have, when required, to furnish particulars of contributions, the names and addresses of every person in receipt of annuity, the amount of the annuity payable to each annuitant, contributions returned to the employer or employees and of sums paid in commutation or in lieu of annuities.

(*vi*) Where an employer pays emoluments to employee or makes on his behalf any contributions of that employee to an approved superannuation fund he shall include all such payments and contributions in his return of income under S. 21.

III. Basis of assessment

The new Act makes a differentiation between classes of residence—resident and ordinarily resident, and resident but not ordinarily resident—as affecting taxability.

Persons who are resident in British India and also ordinarily resident have to pay tax on (*a*) income accruing or arising in British India, (*b*) on hitherto unassessed foreign income from 1st April, 1933, brought into British India and

(*c*) each year's foreign income accruing from 1st April, 1938—a sum up to Rs. 4,500 in this category is not taxable in that year if it is not brought into British India. But even here the same will be liable to be taxed in later years as and when it is brought into British India. Persons who are "resident" but are "not ordinarily resident" in British India have to pay tax (*a*) on all income accruing or arising in British India, (*b*) on foreign income brought into or received in British India, and (*c*) on all income accruing or arising out of a business controlled in or a profession or vocation set up in India whether brought into British India or not. It will thus be seen that the difference in the basis of taxation between the above two classes of residents is that while the person who is resident and ordinarily resident in British India pays tax each year on all his income, British Indian and foreign, on the accrual basis ("total world income"), the person who is resident but not ordinarily resident does not pay tax (*a*) in respect of income accruing or arising outside British India from a business not controlled in or a profession or vocation not set up in India and (*b*) in respect of income accruing or arising otherwise than from a business controlled in or a profession or vocation exercised in India. Nevertheless, such income is liable to be taxed in his hands as and when the same is brought into British India. In the case of persons who are not resident in British India, the tax is payable only in respect of income accruing or arising or deemed to accrue or arise in British India.

The definition of residence is in substance as follows:—

To be a resident an individual must have been (*a*) in British India for half the number of days in the year (to be correct 182 days) or (*b*) must have maintained a dwelling house in British India and must have visited British India at least once during the year or (*c*) must have been in British India for periods amounting to a year during the preceding four years and must have visited British India during the year otherwise than on an occasional or casual visit. An individual is "not ordinarily resident" if he is not resident in British India in nine out of the ten preceding years or if he has not during the seven preceding years been in British India for a total period of two years.

A company is deemed to be resident in British India if it is wholly controlled in British India or if more than half its entire income arises in British India. It is ordinarily resident in British India if it is resident in British India. Thus there is no distinction between residence and ordinary residence in the case of a company. So in the case of a company, if it is controlled wholly in British India or its income arising in British India is more than half its total income, then it is taxable on all its world income. If it is controlled in India (though not wholly in British India) then it is taxable (*a*) on its income arising or accruing in British India and (*b*) on its income from business arising anywhere and (*c*) on its income from other sources as and when received in British India.

When we come to the definition of the residence of a Hindu undivided family, we find that it is resident unless the control and management of its affairs is wholly outside British India and it is deemed to be ordinarily resident only if its manager is ordinarily resident in British India. So that, if the manager of the undivided Hindu family is a non-resident, the resident family is liable to be taxed only on its income accruing in British India and on its foreign income received in British India and on its other income derived from a business controlled in India.

In the case of firms or other association of persons, they are resident and ordinarily resident if they are not wholly controlled in or managed outside British India. Here again the observations made in respect of a company controlled or managed in India apply with equal force.

The rate of tax applicable to residents and non-residents is different. The resident is assessed on the rate applicable to his income. A distinction is also made among the non-residents between British subjects and non-British subjects. A non-resident who is a British subject or a subject of a State in India or Burma pays income-tax and super-tax on his total income at the average rate applicable to his total world income. A non-resident who is not a British subject pays income-tax at the maximum rate on his total income and super-tax at the average rate applicable to his total world income.

No provision has been introduced here as in U. S. A. to compel non-residents to satisfy the Government, before they

leave this country, that they have paid all tax due in respect of income earned here.

IV. Special provisions against avoidance

The rising burden of income-tax and super-tax has brought about many methods of avoidance of this liability very largely through the media of company formation and transfer of assets to others both in and out of British India and making settlements of income or properties. When super-tax was first imposed in 1917, the maximum rate for income-tax was 1 anna in the Rupee and for super-tax 3 annas in the Rupee. The first Rs. 50,000 was exempt from super-tax. Rates have since been increased. The present maximum income-tax rate together with surcharge is $28\frac{1}{8}$ pies in the Rupee and for super-tax 6 annas and $9\frac{1}{4}$ pies in the Rupee. The exemption limit was lowered to Rs. 30,000 from Rs. 50,000. Individuals having substantial incomes thus pay heavy sums by way of tax, and therefore there is the incentive to reduce the income-tax and super-tax burden to the lowest possible limits.

As the machinery of avoidance was very widely adopted in relation to the following matters, the Government felt its duty to close up all material loopholes in regard to:

(*a*) Limited companies and accumulated profits.
(*b*) Transfer of assets abroad.
(*c*) Transactions in securities and sales cum dividend.
(*d*) Settlements and Trusts.
(*e*) Dividends.

(a) Limited companies and accumulated profits

A most convenient method of avoidance was to form companies in and out of British India transferring assets to them so that the income (British Indian and foreign) accruing to the companies and accumulated in the companies' hands may avoid taxation either by not distributing dividends or by distributing income in the shape of capital. As the machinery of companies was successfully employed for legitimate tax avoidance and it began to be widely adopted, the Legislature attempted to dam the leakage by enacting S. 23-A of the Act. The issue of income in the form of shares instead of dividends by the retention of the company's income with the company itself was held to be capital receipt and this principle was applied even to cases of issue of debentures by the company.

The several requisites necessary to set in motion S. 23-A machinery led to great uncertainties and possibilities of chal-

lenge varying with types of businesses and the Crown had also to prove that the avoidance was with an intention to evade payment of tax before a direction could be made under the section. The section was applied only in two cases and it could not be made use of in other cases.

S. 23-A is now made applicable to all companies in which the public is not substantially interested, and not merely to companies which are under the control of not more than 5 persons. The section says that where the profits and gains distributed as dividends by a company up to the end of the sixth month after its accounts for the previous year are laid before the company in the General Meeting together with the income-tax payable thereon is less than 60 per cent. of the assessable income of the company of the previous year, the Income-tax Officer shall unless he is satisfied that having regard to losses incurred in earlier years or to the smallness of the profits made, the payment of a larger dividend would be unreasonable make an order that the assessable income shall be deemed to have been distributed as dividend among the shareholders and included in the shareholders' total income. Where the accumulated undistributed profits exceed the value of the fixed assets or the paid-up capital together with any loan capital belonging to shareholders 100 per cent. is substituted for 60 per cent. A further provision is also made to make allowance for a possible case of error in which though if 60 per cent. of the assessable income of the company has not been actually distributed, an amount not less than 55 per cent. has been distributed and the company is given a chance to rectify the defect by distributing the balance of 5 per cent. also.

The proviso has also been altered so as not to apply the section to subsidiary companies of a company in which the public are substantially interested if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof. Further consequential amendments have been made to the section and it is also made clear that where a company is a shareholder of a company to which the section applies the amount of the dividend deemed to have been paid to the shareholder company shall be deemed to be part of its total income for the purpose of application of the section to distribution of profits by the shareholder company. The tax due by the shareholder is now to be recovered from

the company, only if it cannot be recovered from the share-holder. The previous approval of the Inspecting Assistant Commissioner is also necessary before an order is passed by the Income-tax Officer.

S. 33-A of the Act which provided an appeal from a decision of the Income-tax Officer under S. 23-A to a Board of Referees has now been omitted and an appeal is provided to the Appellate Assistant Commissioner under S. 30.

The amended section relieves the Income-tax Officer of the duty of determining whether the profits and gains are allowed to accumulate beyond its reasonable needs, existent and contingent, having regard to the maintenance and development of its business and an enquiry as to whether there was an intention to evade payment of super-tax by the members.

(b) Transfer of assets abroad

The new S. 44-D has been enacted to bring into the net of taxation persons who with a view to avoid tax transfer their assets abroad to persons or to companies incorporated outside British India.

These are cases where by a transfer of assets and by a series of transactions, income is paid or becomes payable to a person 'not resident' or to a person 'resident but not ordinarily resident', but the person who so manages the affairs is really in control of and in some cases in enjoyment of the income of such other person. This provision is analogous to cases of settlement of income on others while in fact the settlor has power over or in enjoyment of the income. Such cases are intended to be caught by this new section.

The section will not apply to genuine formation of foreign corporations and transfer of assets, but the assessee has to show that the formation of the company or the transfer of assets was not for avoidance of tax.

(c) Transactions in securities and sales cum dividend

Under sub-Ss. (1) and (2) of S. 44-E it is provided that if an owner sells or transfers securities, stock or shares and by the agreement of sale or by any collateral agreement buys back or re-acquires the securities, stocks or shares any interest or dividend thereon which as a result of the transaction becomes receivable by any other person is to be deemed to be

the income of the original seller for all the purposes of the Act, that is, income-tax and super-tax.

Under sub-Ss. (3) and (4) it is provided that where any person carrying on business which consists wholly or partly in dealing in securities, stocks and shares buys or acquires securities, etc. and under the agreement for purchase or collateral agreement sells back or retransfers the securities, etc. and the result of the transactions is that interest is receivable by him, no account shall be taken of the transaction in computing his profits or loss in business.

The scope for avoidance referred to above was due to the legal position that interest on securities and dividends did not accrue day to day but were receivable only on the day the holder is entitled to draw them.

This provision has been introduced as it was found that several lacs of rupees per annum representing tax on interest on securities, etc., were being refunded as a result of owners of securities, etc., of large sums arranging with a person not liable to income-tax or liable to a lower rate of tax to sell or transfer those securities to him shortly before interest or dividend becomes due, and to buy back or get a retransfer after interest or dividend is paid. The original seller receives interest or dividend in the form of price that is capital appreciation not chargeable with super-tax, and where the purchase is made by a person or company whose business is to buy and sell securities, and he resells shortly after the payment of interest or dividend, loss in the transaction is allowable to him and could be set off against other income received by him.

S. 44-F deals with a case of an individual liable to super-tax escaping super-tax by selling his securities in the market and rebuying after the interest date, thus escaping super-tax on the capital profit.

(d) Settlements and Trusts

A variation in the ordinary Law of Trusts is introduced in S. 16 of the Act to cover certain cases of evasion of income-tax. In England the Law of Trust was utilised as a device to evade tax and special provisions were made. The various Finance Acts and Part 4 of the English Finance Act of 1938 contains a fasciculus of sections designed to deal with such cases. Similar provisions are also enacted under the Indian Amending Act to

deal with income transferred by way of settlements or dispositions or revocable transfer of assets with a view either to evade tax or to make the tax payable at lesser rates. The section deals with those classes of cases in which provision is made for the retransfer directly or indirectly of the income or assets to the transferor or settlor or in any way gives him the right to reassume power directly or indirectly over the income or the assets.

The section does not apply to those cases of settlement or disposition which are not revocable for a period of six years or during the lifetime of the settlor or disponer and from which income he does not derive any direct or indirect benefit and is unable to obtain for himself the beneficial use of the income.

The section applies even to transactions before the Amending Act and to all cases of Trusts or Settlements however *bona fide* they may be which come under the provisions of the Act. In effect those dispositions or transfers to which the section applies are to be regarded as having been made with a view to evasion of income-tax.

The conditions obtaining in India do not lend scope to the wide use of the Law of Trusts for evading taxation, and Trusts are usually effected in this country to provide maintenance for dependant relatives and members of one's family, the corpus reverting to the settlor when the purpose of the Trust is served.

In the present provisions, the maxim that the way in which one's income is applied cannot affect the liability to tax of the person to whom the income arises is applied. In other words the arrangement is treated as a method of utilisation of or an expenditure out of one's income and should be regarded on the same footing as items of expenditure which are not allowable deductions under the Act. Taxpayers are liable to pay tax upon items of income which they cannot themselves enjoy.

Under the present Act, trustees or guardians for several beneficiaries are treated as an Association of Persons and single assessments on income belonging to several beneficiaries or wards were made in the hands of the trustee or guardian. This has been rectified in the Amending Act by making the assessments on trustees at rates applicable to the income of each beneficiary, the trustee being assessed only as the agent of each

beneficiary. The tax to be paid by the trustee is analogous to that of an employer paying the tax due by the employee on salaries.

All income howsoever, and for whatever period settled is deemed to be income of the settlor where the assets remain with the settlor. This is intended to bring into the net of taxation persons who retaining the corpus settle on others the income not liable or liable to a lower rate of tax. This prevents the wide use to which rich assessees may put the law of trusts settling income on dependent relatives and servants, themselves having a control over the income. But where the assets and income both pass and the settlement is not revocable for a period of six years or for the lifetime of the settlor or disponer, the case is outside the pale of the Act and is not taxable in the hands of the settlor. But even here once the power to revoke operates the Act applies.

(e) Dividend

One of the usual methods adopted to avoid super-tax which would otherwise be payable by shareholders was to distribute profits in the form of capital receipts like bonus shares, bonus debentures, etc., which under the law as it stands at present will not be income in the hands of the shareholders and hence not liable to tax.

"Dividend" has now been defined to include thereunder the distribution of capitalised profits which entails release by the company to the shareholders of any assets of the company and debenture-issues out of the accumulated income. The new definition covers the case where a company goes into liquidation and distributes the accumulated profits which arose prior to the 6 previous years of the company preceding the date of liquidation and also includes any distribution by a company on the reduction of its capital to the extent to which the company possessed accumulated profits which arose after the end of the previous year ending next before first day of April, 1933. The "dividend" as now defined is included in the definition of income. The definition is aimed more at shareholders of companies formed for the purpose of reducing tax payable by individual shareholders than at companies carrying on legitimate business. It does not include any distribution by way of bonus shares as it does not entail release of any assets by the company but only

means the user of such assets in the company itself by way of increase of capital.

Under Explanation (3) to S. 4 (1) a 'dividend' paid without British India is now to be deemed income accruing or arising in British India to the extent to which it has been paid out of profits subjected to income-tax in British India.

Until now under S. 14 'dividend' received by a shareholder was exempt from taxation to income-tax in his hands. This exemption proceeded on the 'idea that for revenue purposes a joint stock company should be treated as a large partnership, so that the payments of income-tax by the company would discharge the quasi-partners'. The consequence of this legislative outlook was that a "dividend" was really a division of profits and when a payment is made to shareholders it is a mere distribution for which the shareholders incurred no liability. The new Act has deleted 'dividends' from S. 14 and dividends will no longer be exempt from taxation.

As a corollary, by a new S. 49-B payment of income-tax by a company is deemed payment by a shareholder on so much of the dividend as the amount of income on which the company has paid income-tax bears to the whole income of the company.

By amendment to S. 18, 'dividend' is placed on the same footing as interest on securities and credit is to be given in the assessment of the shareholder for the appropriate amount of tax.

The effect of the above provisions of the Amendment Act is that shareholders are now made liable to be taxed even in respect of income which was exempt in the hands of the company.

V. Change from the step system to slab system

Another great change in the system of taxation in the Amending Act is the introduction of the slab system. Under this system, every slice of income is taxed at a particular rate. The rate on higher incomes increases as the income increases. It was stated by the Finance Member that under this system on the basis of the standard rate suggested by the Income-tax Enquiry Committee which has now been adopted, all persons getting incomes of Rs. 8,000 and under will pay less than the present tax, while of the persons getting incomes between Rs. 8,000

and Rs. 24,000, some will pay less and some more and persons getting income of over Rs. 24,000 all will decidedly pay more as tax. The introduction of this system has also necessitated the insertion of a clause providing for the calculation of tax in cases where out of the total income, certain sums are exempted from payment of tax, namely, life insurance premia, etc. In such cases the tax shall be an amount bearing to the total amount of income-tax excluding super-tax which would have been payable on the total income had no part of it been exempted, the same proportion as the unexempted portion of the total income bears to the total income.

VI. Salaries

Under the Act as it stands income under the head salaries was taxable only on payment and receipt. Tax was being postponed or evaded by postponing the receipt of salary or by taking advances or loans.

The Act has now been amended to cure these defects so as to make sums due under that head liable on the date when they are due whether paid or not, and advances by way of loans or otherwise of income are hereafter deemed salary due on the date they are received.

But to safeguard against possible hardships to the employees due to the insolvency of the employer or other causes, the employee cannot be called upon to pay the tax himself unless he has received the salary without such deduction.

The Privy Council decision in *Commissioner of Income-tax, Bengal* v. *Shaw, Wallace & Co.*[1] held that capital sums received as a sort of solatium for compulsory cessation of business or in commutation of pension, or a consolidated compensation for death or injuries or in payment of insurance policy or the accumulated balance from a Government Provident Fund cannot in any scheme of taxation be regarded as income. Income has now been defined in the Act as including a profit received in lieu of salary as provided in explanation (ii) to sub-S. (1) of S. 7. This explanation says that a payment due to or received by an employee from an employer or from his Provident Fund at or in connection with the termination of his employment (not including his own contribution) is to be deemed salary provided it is a payment not made for loss of

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1. (1932) 63 M.L.J. 124: L.R. 59 I.A. 206: I.L.R. 59 C. 1343 (P.C.).

office but by way of remuneration for past services. The result of this is to nullify the effect of the Privy Council decision to the extent stated.

Exception is however made in favour of payment made out of recognised provident funds and approved superannuation funds.

Changes have also been made in regard to deduction of tax at source. Hereafter not only income-tax but super-tax should be deducted at source and provision has also been made to deduct income-tax and super-tax at specified rates in respect of salaries paid to non-residents.

By Explanation (2) to S. 4 (1) all income which would be chargeable under the head salaries if payable in British India and not being pension payable without British India, is deemed to accrue or arise in British India wherever paid if it is earned in British India.

The Legislature is able to deal with such cases by deeming it income accruing or arising in British India and securing the tax thereon by providing for deduction of tax at source.

For example if a person entered into a contract of service with his employer in British India and was appointed as a travelling representative outside British India, he will be liable to tax on his salary even though his salary was payable, under the contract, outside British India.

VII. Firms—Registered and unregistered

The position of Registered and Unregistered Firms has been fundamentally modified. No tax is levied on a Registered Firm but a computation of the income and profits of the firm is made. The share in the profits of the firm of each individual partner is directly assessed on him along with his other income. If there be loss in the registered firm the share of loss of each partner could be set-off against his other income and where it could not be wholly set off the portion not set-off can be carried forward to the following year up to a period of six years, the first of the six years commencing from April, 1939. But such carrying forward of losses is permitted to be set-off only against the profits of the same business, profession or vocation. But an unregistered firm is assessed to tax and if loss is incurred by an unregistered firm it could only be set-off against other income if any of the

firm itself and not against the income, profits and gains of any of the partners of the firm. But if the unregistered firm is treated as a registered firm by the Officer of his own motion in circumstances set out below the benefits accruing to partners of a registered firm equally apply to the partners of the unregistered firm. Another new feature introduced in regard to an unregistered firm is that if the aggregate amount of tax including super-tax payable by the partners if assessed in the manner laid down for registered firm would be greater than the total tax payable by the firm if assessed as an unregistered firm the Officer is empowered to place the unregistered firm in the position of a registered firm. In other words if the partners of an unregistered firm would pay less tax than if the firm had been treated as such registered firm, the Officer can of his own motion act as if the firm got itself registered.

VIII. Assessment of Insurance Companies

The method of assessment now adopted has been changed which gives considerable relief to the companies. Hitherto an Insurance Company was assessed on the surplus between the assets and the annual valuation of liabilities without taking into consideration the sum re-distributed among the policy holders in the shape of bonus.

Under the Amending Act, the Department has two methods of computation to choose from, either the income on investments less expenses, or the alternative basis of the surplus as hitherto, allowing for a portion of the bonus paid to the policy holders which is really to a certain extent their own premiums collected in excess of what was needed as premium repaid to them. What was not wholly income was being taxed hitherto by adopting the method based on the actuarial surplus. But this has been remedied now by adopting a more accurate method of computation either on the basis of actuarial surplus or the basis of income less expenses.

IX. Carrying forward losses

Another of the important changes effected in the present Bill is that an assessee is permitted to carry forward the losses incurred by him in one business and have it set off against his income from the same business in the succeeding years up to a period of six years. But during the transition stage, such carrying forward is restricted. The losses incurred in the

account years 1938-39 to 1942-43 can be so carried forward only to one, two, three, four and five years respectively. This carrying forward of losses is apart from the other provision by which a loss incurred by a person in any year under any head can be set off against his income, profits and gains under the other heads in the same year. But the carrying forward of loss for setting off can only be against the subsequent income from the same business. If a business which has suffered loss is discontinued, such loss cannot be set-off in the succeeding years since that business no longer exists to yield income and such loss would become a capital loss. Such carrying forward is also not permitted if there is a change in the constitution of a firm or if a person is succeeded by another person except by way of inheritance as the object is to confer the privilege to the particular persons incurring the loss. A person who is a partner in a registered firm can have his share of loss incurred in a year set-off against his other income in the same year and can also carry forward the loss or the balance of loss and set it off against his share of income from the same business in the subsequent years. Where a person is a partner in an unregistered firm and the unregistered firm sustains a loss in any year, his share cannot be set-off against his other income even in the same year. The loss can be set-off only against the profits and gains of the unregistered firm in the succeeding years. Where an unregistered firm is treated and assessed by the Income-tax Officer as a registered firm, then the provisions in respect of a registered firm also apply to such a firm.

X. Depreciation Allowance on Buildings, Machinery and Plant

The present method of granting allowances for depreciation is the straight method of allowing particular percentages on the original cost till the original cost is exhausted. In modification of the present straight method, the written down method, that is allowance on the basis of the written down value of such machinery, etc., each year has been introduced. The written down value has to be arrived at or calculated every year. Where the assets are acquired or purchased in the year of account, the written down value will be the actual price paid by the assessee for such machinery or plant. Where the assets are acquired before the account year but after the commencement

of the Amendment Act, the written down value could be the actual price paid by the assessee for such plant or machinery less all depreciation allowance to the assessee for every year after purchase till the account year on such plant or machinery. Where the assets have been acquired or purchased before the commencement of the Amendment Act, the written down value will be the actual cost of such machinery or plant less for each financial year since acquisition the amount of depreciation applicable to the assets at the rates in force for each such year since 1st April, 1922, and at the rates in force on 1st April, 1922, for each such year prior to that date.

Allowance on the basis of the written down value each year necessitated special income-tax treatment of such assets involving the maintenance of a new set of books for all machinery, etc., for purposes of income-tax, so as to display the wear and tear attributed to each unit in order. This will facilitate the claim for obsolescence and will avoid difficulties though it involves time and trouble to assessees who have to claim depreciation. Valuation of such assets by deducting depreciation for domestic or commercial purposes and the keeping of reserves, etc., has necessarily to be on different principles.

XI. Allowance for Life Insurance Premia

Hitherto relief was given from the tax payable on the income of any person in respect of premiums paid for insurance on his own life or on the life of his wife or for any deferred annuity on his or his wife's life but the relief was subject to the restriction that the total amount of premiums on which relief is given is not to exceed 1/6 of the total income of the assessee.

Under the Amending Act while retaining the limit of 1/6 the maximum is fixed at Rs. 6,000 in the case of an individual assessee and at Rs. 12,000 in the aggregate for a joint Hindu family. This provision prevents richer assessees from claiming sums in excess of Rs. 6,000 or Rs. 12,000 as the case may be. Another change introduced in the Amending Act is that the wife in her assessment is enabled to claim relief for the premium paid by her on the life of her husband. It may be remembered in this connection that in England the life assurance allowance is granted only if the insurance, etc., is with a company legally established in the United Kingdom or British Possessions

or with any company lawfully carrying on business in the United Kingdom. No such restriction is introduced in the Indian enactment.

XII. Deductions of Tax at source

The Revenue employs the system of deducting tax at source for facility, certainty and early collection. This system was hitherto adopted in respect of (*i*) Income-tax on Salaries (S. 7), (*ii*) Income-tax on Interest on Securities (S. 8), (*iii*) both Income-tax and super-tax on interest (not being interest on securities) paid to a non-resident under the circumstances stated in S. 18 (3-A) and (3-B), (*iv*) Super-tax on dividends paid to a non-resident S. 18 (3-C) and (3-D), and (*v*) payment of accumulations in recognised Provident Fund (58-H).

There was no provision for deducting super-tax in respect of salaries or any tax on salaries or interest other than interest on securities paid to non-residents and these have now been remedied by amendments to S. 18.

Sub-section (2) of S. 18 has been amended so as to provide for deduction at source of super-tax also on "salaries" and not merely income-tax as hitherto fore, and the rate at which deduction has to be made is the average of the rates applicable to the estimated total income of the assessee under the head "Salaries". The new sub-section (2-B) directs that if any salary is paid to a person not resident in British India, income-tax at the maximum rate and super-tax at the rates applicable to the estimated income should be deducted.

The new sub-S. 3-A provides that any person paying to a non-resident any interest not being interest on securities or any other sum chargeable under the Act, shall deduct income-tax thereon at the maximum rate unless he himself is liable to pay tax thereon as agent.

Consequential amendments are also made in the section.

Sub-S. (5) has been amended to include income-tax on a dividend as a sum for which credit is to be given to a shareholder in his assessment.

This amendment puts dividends on the same footing as securities and credit for the appropriate amount of tax on it will be given in the shareholder's assessment.

As a corollary, by a new S. 49-B, payment of income-tax by a company is deemed payment by a shareholder on so much of the dividend as the amount of income on which the company has paid income-tax bears to the whole income of the company.

In case of failure by a Principal Officer of a company to deduct tax either on account of the order of the Income-tax Officer or because the dividends paid exceed the maximum not chargeable to tax as provided for respectively in sub-S. 3-D and sub-S. 3-E of S. 18, both the Principal Officer of the company and the company are made liable for the tax.

By Chapter IX-B special provisions are made in regard to certain classes of superannuation funds and the new S. 58-S (2) provides that the Trustees of the superannuation fund should deduct income and super-tax at the average rate of tax during the preceding three years in cases where contributions are repaid to an employee during his life time but not at or in connection with the termination of his employment. This does not apply to persons whose employment was carried on abroad.

XIII. Making of Additional Assessments and Reopening of Assessments

Hitherto the Income-tax Officer could assess only for one previous year on the ground of escape of assessment either wholly or partially. This power should be exercised within one year from the end of the year in which the income should be taxed. Under the Amending Act, the Income-tax Officer can go back further and reopen a completed assessment or make fresh assessment where no assessment had been made up to a period of four years where there is a *bona fide* error on assessee's part in not returning the income in full. But where the Income-tax Officer has reason to believe that the under-assessment was due to the fact that the assessee concealed particulars of his income or deliberately furnished inaccurate particulars, such power to reopen can be exercised for a period of eight years. A difference is thus made between a genuine mistake and deliberate mistake to defraud revenue. This power can also be invoked in a case where excessive relief has been granted. But in practice, this difference will not be made in a majority of cases as every assessee must be aware of his income and know the law and must take the consequence of not disclosing all his income. Thus every taxpayer coming into the net is provided for

and power is taken to deal with obstruction and dishonesty. An exception has been made in the case of a person who has been assessed as the agent of a non-resident under S. 43 where a fresh assessment could be made only within one year from the end of that year. Lest the Act should be deemed retrospective, provision is also made that in the case of assessments prior to the commencement of the Amendment Act, such back assessment can be made only within one year from the end of that year. What is required in all these cases is that action should be taken under S. 34 within the periods mentioned above and the fresh assessments may be completed later. To avoid assessments or re-assessments being kept pending for a long number of years it is stated that in all cases assessments or re-assessments should be completed and orders passed ordinarily within four years. But where the provisions of cl. (*c*) of sub-S. (1) of the penalty section 28 applies, the same should be done within eight years. Since it is the Officer who is finally to decide whether the under-assessment was due to *bona fide* cause or due to the fraud of the assessee, every person should be prepared to submit returns, explain transactions and produce his accounts and evidence in support thereof up to a period of nine years from the date on which the transactions took place. This provision necessitates the preservation of all accounts, documents and correspondence and evidence for nearly a decade. In such back assessments after a long lapse of years, it is doubtful whether an assessee would be able to explain his accounts in the same manner in which he might be able to do it if he were called upon to do so earlier. By the operation of this section, if a fresh assessment is made it could be only to the disadvantage of the assessee as the assessee is not given an opportunity to show that he is over-assessed and have the assessed income reduced.

In cases of succession, the successor cannot be assessed to such tax except for one year (S. 26). It is not clear whether this provision could be applied (*a*) to the case of a Hindu undivided family which becomes divided and ceases to be a joint family and (*b*) to the case of a company which is dissolved and the Officer finds that its income three or four years previously has been under-assessed.

In the case of assessees who are not alive and who escaped assessment, no such limitation of one year is made. The

law has been amended so as to render legal representatives of an estate liable in respect of income, profits and gains which ought to have been returned and which were not returned for the period of four years or eight years as stated above. Thus the estate is made liable to all penalties for fraud or negligence as the Act would have imposed upon the deceased taxpayer, if he had still been alive. In the past one assumed that back assessment cases concerned only the living and not the dead, and when the taxpayer died, liability to penalties for negligent or fraudulent returns died with him. With death duties on the horizon and imminent, on an investigation into the estate of deceased for death duty purposes, information leading to proceedings for penalties and back assessment can easily reach the Income-tax Officials. Figures may raise a *prima facie* case of fraud and the only person who could refute the implication may be the deceased. Fraud is both a state of mind and a question of fact and there will be great difficulty in explaining matters and the deceased if alive might have been able to give a perfectly correct explanation of what had taken place and to show that penalty provisions could not be applied. The object of these provisions is to raise the morale of the people.

It may be here pointed out that the English Statute (Section 29 of Finance Act, 1923) while extending the period of back assessments from 3 to 6 years, specifically provided that in the case of raising fresh or additional assessments on the estate of deceased persons, the three years rule shall be applicable.

It is significant to note that there is no complementary provision placing the Taxpayer and the Revenue on an equal footing, though a taxpayer may make an honest mistake and no retrospective right is conferred on him.

XIV. Assessment, Appeals and Administrative Machinery

Under the Act before the amendment, in cases where the Principal Officer of a company or any other person who is an assessee made defaults and failed to make a return or to comply with all the terms of a notice issued by the Officer requiring him to produce accounts or documents, the Income-tax Officer had power to make an assessment to the best of his judgment and also to cancel the registration of any firm. No appeal was provided against such estimated assessment and the only remedy which the assessee

had was to apply to the Income-tax Officer himself under S. 27 and to get the assessment set aside on satisfying the Income-tax Officer that he was prevented by sufficient cause from making the return or complying with the terms of the notice issued. This led to a great hardship and assessees were unable to fight the assessment on its merits. This has now been remedied by making such assessments also appealable in the regular manner similar to an appeal against an *ex parte* decree.

In effect it may be said that under the Amended Act all orders passed by the Income-tax Officer affecting the assessee are appealable and this is definitely of great importance. If however the appeal is against an order levying penalty for non-payment of the tax within the time allowed, the appeal will be entertained only if the tax has been paid.

The duties of the Assistant Commissioner have been separated and two categories of Assistant Commissioners have now been appointed, namely, Inspecting Assistant Commissioners and Appellate Assistant Commissioners. The former have nothing to do with the hearing of the appeals against orders of the Income-tax Officer which is solely entrusted to Appellate Assistant Commissioner. Though both categories of Assistant Commissioners are under the control and subject to the jurisdiction of the Central Board of Revenue, the Central Board of Revenue cannot interfere or give any instructions or orders so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate jurisdiction. This division of functions is a salutary change. As the Appellate Assistant Commissioner performs more or less judicial functions it is now provided that the Income-tax Officer has the right to be represented before him at the hearing of an appeal against an order of the Income-tax Officer.

By far the most important change introduced by the Amending Act is the provision made for the introduction of a further appellate authority of an independent nature for the hearing of appeals from decisions of the Appellate Assistant Commissioners.

It is provided in Part II of the Schedule that the Central Government shall appoint an Appellate Tribunal consisting of not more than 10 persons made up of an equal number of judicial members and accountant members. The normal qualifi-

cation for a judicial member is that of a District Judge and the qualification for an Accountant Member is that of an Auditor who has practised for not less than six years. But the Central Government may appoint as an Accountant Member though not possessing the qualifications aforesaid a person who, by his other qualifications and adequate experience, is found suitable for appointment to the Tribunal.

Not less than two members are necessary to form a Bench and the number of Judicial or Accountant Members in a Bench should not exceed each other by more than one. The decision of the majority governs the case and in the case of a tie the matter is to be referred to the President of the Tribunal on stated points who refers it for the opinion of other member or members and the final decision is according to the majority opinion of all members who heard it. In order that both the department and the assessee may have sufficient time and opportunity to acquaint themselves and be prepared for the change, the Appellate Tribunal is not to take effect immediately but is to come into effect not later than two years from the commencement of the Amending Act. It is also provided that an assessee may appeal, or the Commissioner if he is not satisfied with the Appellate Assistant Commissioner's order may direct the Income-tax Officer to appeal, to the Appellate Tribunal against the order of the Appellate Assistant Commissioner under Ss. 28 or 31 and the appeal should be filed within 60 days of service of notice of such order. The Appellate Tribunal is to decide the appeal after giving notice to both parties and its orders are final except in cases to which S. 66 applies (namely statement of case by the Appellate Tribunal to the High Court).

The present Ss. 32 and 33 dealing with appeals to the Commissioner against the order of the Assistant Commissioner and power of revision will not operate when the Appellate Tribunal as abovesaid is constituted. The Appellate Tribunal is given the power to regulate its own procedure to rectify any mistakes and to take evidence on oath, to call for evidence, production of documents, etc.

S. 66 as it now stands is amended and it is provided that within 60 days from the service of the notice of order by the Appellate Tribunal, the Commissioner or the assessee as the case may be, may file an application (accompanied in the case of the assessee by a fee of Rs. 100) requiring the Tribunal to refer to

the High Court any question of law arising out of the order of the Tribunal and the Appellate Tribunal is directed to draw up a statement of the case and refer it to the High Court but where the Tribunal refuses to state a case on the ground that no question of law arises, the aggrieved party is given the liberty to move the High Court within 6 months of the date of refusal to direct the Tribunal to state a case and refer it. If the Appellate Tribunal refuses to state a case on the ground that the application filed is out of time then also the aggrieved party has got the right to move the High Court within 60 days.

It will therefore be seen that two appellate authorities are provided for and there can be two appeals as of right in each case. The Appellate Tribunals are hereafter the ultimate judges of fact and not the Assistant Commissioner or the Commissioner and so far as a reference to the High Court is concerned both the Department and the assessee are placed on the same footing.

The appointment of an appellate tribunal can be said to be a most important provision in the Amending Act in favour of the assessee and goes a long way to remove the grievances and complaints made by the assessees hitherto that the scales had not been held even as between the taxpayer and the tax gatherer.

Under S. 5 (2) of the Act provision has been made to enable the Government of India to appoint not more than three Commissioners of Income-tax without reference to area to work directly under the Central Board of Revenue.

The idea underlying this is to create a centralised or special branch to deal with special branches of work or matters of special difficulty or importance, *e.g.*, companies, insurance, penalty, fraud, etc. and with a view to bring under one head assessment of persons who are assessed in different areas.

XV. Amounts hitherto not assessable now made assessable

This has been done by enlarging the area of taxation as in S. 4 or by extending the definition of income by deeming certain sums as income which were hitherto either held as capital sums or income not liable to tax.

Sums mentioned in the following sections which have been dealt with in detail under different heads are now taxable

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as income. A reference is invited to the following sections: 2 (6) A, 4 (1) Explanation (2), 4 (1) Explanation (3), 4 (2), 16 (2), 16 (3), 42, 44-D, 44-E, 44-F.

Under S. 2, (6-C), (i) a profit received in lieu of salary; (ii) sums got in excess of written down value when plant or machinery is sold; (iii) mutual assurance profits; (iv) under cl. (xi) of S. 10 (2) the excess sum received over a sum written off as bad debt are deemed income under the new Act.

Explanation (3) to S. 4 (1) says a dividend paid without British India shall be deemed to be income accruing or arising in British India to the extent to which it has been paid out of profits subject to income-tax in British India. By an addition to S. 42 of the Act, interest from money lent abroad by a non-resident and brought into British India in cash or in kind (by the borrower) shall be deemed to be income accruing or arising within British India assessable either on the non-resident or his agent.

S. 60 of the present Act gave power to the Governor-General to exempt particular classes of income from tax under which many items of income have been exempted by notification. This section has been modified in such a way that while taking away the scope of exercising the power of exemption hereafter, power is retained only for the purpose of revoking or modifying exemptions already given.

Under the present Act the income from agricultural land in a Native State in India paying land revenue to the Indian State is exempt. But such agricultural income would be assessable under the Amendment Act. The land tax may be payable to the Native State Government and Income-tax to British Indian Government and there will be no relief against double tax in respect of such taxation. Income from agricultural lands in Burma will be assessable in British India on the accrual basis.